SWI REALTY SDN BHD

v.

JABATAN PERKHIDMATAN PEMBENTUNGAN & ORS

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: MT1-24-956-199]
7 AUGUST 2003

ADMINISTRATIVE LAW: *Exercise of administrative powers - Government department - Approval of sewerage treatment plant system - Approval conditional on payment of capital contribution - Whether condition unlawful - Whether unconstitutional - Federal Constitution art. 96 - Sewerage Services Act 1993 ss. 9, 31(1) - Interpretation Acts 1948 & 1967 s. 40(2)(b)*

STATUTORY INTERPRETATION: *Canons of construction - Generalibus specilia derogant - Sewerage Services Act 1993 ss. 9 & 31(1) - Intent and purpose - Whether to consolidate laws relating to sewerage system and services - Whether not a tax imposing statute*

The first defendant had approved the sewerage treatment plant system that the plaintiff had sought to build for its housing project upon condition, *inter alia*, that the plaintiff pay some RM 368,300 to them as costs for future treatment infrastructure. The sum, apparently, was levied pursuant to the provisions of ss. 9 and 31(1) of the Sewerage Services Act 1993 ('the SSA') read together with s. 40(2)(b) of the Interpretation Acts 1948 & 1967 ('the IA'). The plaintiff protested at the levy, but nonetheless paid the revised sum of RM345,860 to the first defendant. Having paid the sum, and obtained the approval, the plaintiff however applied for the return of the money arguing that the imposition of the payment was unlawful and contrary to law. The issue that arose was whether the first defendant, in law, had the power to require the plaintiff to make the capital contribution in question.

Held (allowing the application):

[1] The first question to consider would be the category under which the capital contribution fell under, namely whether it was a tax, rate, levy etc. The relevancy of this question became obvious in view of art. 96 of the Federal Constitution which states that no tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law. (p 736 h-i)

[2] Unlike the Sales Tax Act 1972, the Service Tax Act 1975 or the Income Tax Act 1967 which were promulgated to charge, levy, collect and impose specific types of taxes, the Sewerage Services Act 1993 and the Interpretation Acts 1948 & 1967 had different functions. The SSA is to amend and consolidate the laws relating to sewerage systems and sewerage services, whilst the IA essentially is to provide for the construction and interpretation of written laws. There was nothing in the SSA that indicated that it was a tax, duty or levy imposing statute or that the Director General was empowered to do just that. (p 737 c-f)

[3] Section 9 of the SSA relates to practical and administrative matters, and certainly short of empowering the second defendant (the Ministry of Housing and Local Government) to impose any kind of tax, levy or any form of capital contribution for future ventures. The dearth of such an empowerment sub-paragraph was a deliberate act on the part of Parliament not to turn the SSA as an Act to collect taxes, levy, duty or charge. To advert to a general law, in this case the Interpretation Acts 1948 & 1967, to justify such a capital contribution is unacceptable, as general provisions do derogate from special ones. In other words, where a special provision (s. 9 herein) is made in a special statute (the SSA), that special provision excludes the operation of a general provision in the general law (s. 40(2) of the IA). (p 739 a-d)

[4] Notwithstanding the second defendant's good motive in imposing the capital contribution, such an act was unconstitutional and contrary to law. (p 739 f-g)

Case(s) referred to:

Attorney General v. Wilts United Diaries Ltd, Times LR Vol xxxvii (886) ***(refd)***

Bencon Development Sdn Bhd v. Jabatan Perkhidmatan Pembentungan dan 2 Lagi (Usul Pemula 25-122-1997) unreported ***(refd)***

Howe Yoon Chong v. Chief Assessor, Property Tax, Singapore [1978] 2 MLJ 87 ***(refd)***

PP v. Chew Siew Luan [1982] 2 MLJ 119 ***(refd)***

PP v. Chu Beow Hin [1882] 1 MLJ 135 ***(refd)***

Perwaja Steel Sdn Bhd & Anor v. Majlis Daerah Kemaman, Terengganu [1994] 2 CLJ 504 HC ***(refd)***

Legislation referred to:

Federal Constitution, art. 96

Interpretation Acts 1948 and 1967, s. 40(2), (2)(b)

Sewerage Services Act 1993, ss. 9, 31(1)

Other source(s) referred to:

Halsbury's Laws of England, 3rd edn, vol 36, pp. 416/417

MP Jain, *Administrative Law of Malaysia and Singapore*, p. 109

For the plaintiff - KH Yeo; M/s Azam-Malik & Soh
For the defendants - Mohd Asnawi Abu Hanipah FC

Reported by WA Sharif

JUDGMENT

Suriyadi Halim Omar J:

On 21 June 1996 the plaintiff had obtained a licence from the Ministry of Housing and Local Government ie, the second defendant to develop Lots 10392 and 39306, into a housing project called Taman Mewah Jaya 111 (hereinafter called the housing project). On 11 September 1996 M/s Haron and Partners as consultants of the plaintiff had submitted to the first defendant a detailed and comprehensive sewerage treatment plant system for consideration and approval meant for the housing project.

The application was approved by the first defendant on 18 November 1996 but subject to 31 conditions, the last being a contribution of RM368,300 as costs of the infrastructure of a future treatment plant. The relevant portion of the letter of approval (TKW3) reads:

> 2. Please be informed that after perusing plans number 2/96/5-M-l, 2, 3, 4, 5, 6, 7 TKR/88/93D, TGL/K/305-L2/1, I have no objection in approving them, conditional on the 31 conditions in enclosure 1 being adhered to.
>
> 3. The relevant plans are returned, which have been approved by the Department for your further action.
>
> Thank you,
>
> ...
> (ONG SOON HAW)
> Director,
>
> Department of Sewerage (Central Unit)
> o/b Chief Secretary,
> Ministry of Housing and Local Government

The relevant 31st condition pertaining to the capital contribution demanded by the second defendant in encl. 1 reads:

> 31. Capital contribution to upgrade the public sewerage treatment system is RM368,300. This amount has to be paid into a trust account which will be created and administered by the Government. In the meanwhile a bank guarantee pertaining that contribution may be accepted by this Department, for the purpose of approving the Certificate of Occupation.

Despite believing that that it was not legally required to make this contribution, but in order to avoid any delay in the issuance of the certificate of occupation, after a recalculation exercise, RM345,860 was paid to the second defendant, under protest. Payment was made on 1 June 1998 per a UOB cheque. In the covering letter the plaintiff had also reserved its rights to demand for the return of the said contribution (FH-2). The defendant had justified the demand of the capital contribution for future development on the premise of the authority provided for under s. 31(1) of the Sewerage Services Act 1993 (SSA 93), read together with s. 40(2)(b) Interpretation Act 1948 & 1967 (IA 48). Section 31(1) SSA 93 reads:

> No person shall construct any sewerage system or septic tank without the prior written permission of the Director General approving the plans and specifications of the proposed sewerage system or septic tank.

Section 40(2) IA 48 reads:

> Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be given as are necessary to enable the person to do or enforce the doing of the act or thing.

Despite the above pertinent provisions, I had not hesitated to reject the defendant's argument, and had accordingly allowed the case of the plaintiff with cost. I now encroach on the reasons as to why I agreed with the stance of the plaintiff.

Apart from the above two provisions, imperative to this case is s. 40(2)(1)(b) IA 48, and I herewith reproduce the salient portion:

> Without prejudice to the generality of subsection (1):
>
> (a) ... .
>
> (b) power to grant approval includes power to impose conditions subject to which the approval is granted; and
>
> (c) ... .

With such a provision, which endows the defendant not only the power to grant approval but also conditions, surely at first glance the defendant's case was home and dry, and to uphold the plaintiff's case was an improbability.

But before proceeding further, perhaps at this stage this poser should be considered first ie, under what category did that capital contribution fall under. Was it a tax, rate, levy or what? The relevancy of this question becomes obvious when one were to scrutinize the Federal Constitution, especially art. 96 which states that no tax or rate shall be levied by or for the purposes

of the Federation except by or under the authority of federal law. If a charge or a financial levy also cannot be imposed through administrative regulation under the general power to make regulations, except when the parent Act specifically confers power for the purpose, how then is a contribution justified when there is a dearth of its very foundation (MP Jain at p. 109 in *'Administrative Law of Malaysia and Singapore'*).

In striking contrast, *inter alia*, to the Sales Tax Act 1972, the Service Tax Act 1975 and the Income Tax Act 1967, which are Acts promulgated to charge, levy, collect and impose specific types of taxes, the Sewerage Services Act 1993 and the Interpretation Act 1948 & 1967 have different functions. The Sewerage Services Act is to amend and consolidate the laws relating to sewerage systems and sewerage services for the purpose of improving sanitation and the environment and promoting health, and to provide for matters connected therewith and incidental thereto. The Interpretation Act, indisputably not legislated to levy money, is to provide for the commencement, application, construction, interpretation and operation of written laws; to provide for matters in relation to the exercise of statutory power and duties and matters connected thereto.

Apart from the above reason, if the Sewerage Services Act, which is a specific Act, and promulgated to collect that tax, levy, charge or some sort of duty, it must be made clear with unambiguous words alluded to it. A strict interpretation approach thus must also be applied and any doubt must tilt in favour of the aggrieved party (*Halsbury Laws of England* (3rd edn) vol 36, pp. 416/417; *Public Prosecutor* [1966] 1 MLJ 93). In this current case, I was unable to identify any general provision, let alone a specific one which indicated that the Sewerage and Services Act 1993 was a tax, duty, or levy imposing statute, and which had empowered the Director General to do just that.

Not wishing to surrender meekly, the defendant had further ventilated that s. 31(1) SSA 93 read together with section 9, was certainly supportive of its case, as it reads:

> Powers and functions of the Director General. Without prejudice to any other power or function conferred or imposed upon the Director General by any other provision of this Act, the Director General shall have the following powers and functions:
>
> (a) to formulate and implement a plan so that all reasonable demands for sewerage services are satisfied;
>
> (b) in consultation with the relevant authorities, prepare a structure plan formulating the policy and general proposals in respect of the development of any new sewerage system and measures for improvement of any existing sewerage system;

(c) to prescribe the minimum standards and specifications of any installation or equipment relating to sewerage systems, septic tanks, connections and private connection pipes and to register persons supplying such installation or equipment;

(d) to set standards and specifications and to prescribe codes of practice for the planning, design, construction, installation, commission and maintenance of sewerage systems;

(e) to exercise regulatory functions specified in this Act and any regulation made under this Act;

(f) to issue licences under this Act;

(g) to secure that the functions and obligations of any sewerage services contractor with whom an agreement has been entered into under section 7 are properly carried out throughout Malaysia;

(h) to ensure that a sewerage services contractor with whom an agreement has been entered into under section 7 is able to finance the proper carrying out of his functions;

(i) to promote the interests of customers of sewerage services or connection services provided by any person licensed under this Act in respect of:

(i) the prices to be charged for the services;

(ii) in relation to sewerage services, the continuity of the services;

(j) so far as it appears to him practicable from time to time to do so, to keep under review the performance of every sewerage services contractor with whom an agreement has been entered into under section 7;

(k) to issue certificates of competency to persons qualified to manage, operate and maintain a private sewerage system;

(1) to carry on such other activities and enter into such contractual arrangements as may appear to the Director General requisite, advantageous or convenient for the purpose of carrying out, or in connection with, the performance of his powers and functions under this Act.

I could not help concluding that the above provision emanating from an indisputable specific Act, despite its apparent pervasive perimeters, had restricted the scope of the powers and functions of the director general to matters of formulating and implementing plans for sewerage services, the formulation of a policy in respect of any new system, ensuring minimum standards of sewerage equipments, regulatory functions, administration of the system, promoting the

interest of customers, reviewing the services of the contractors, issuance of certificates of competency and matters relating to the performance of his powers and functions. In short the scope relates to practical and administrative matters, and certainly short of empowering the second defendant to impose any kind of tax, levy or any form of capital contribution for future ventures, especially those lacking in nexus with the plaintiff's project.

Having reviewed all the facts, the dearth of such an empowerment sub-paragraph must not be construed as a flaw or an inconsistency, but a deliberate act on the part of Parliament not to turn the Sewerage Services Act 1993 as an Act to collect taxes, levy, duty or charge. To desperately advert to a general law, in this case the Interpretation Act 1948, to justify such a capital contribution is unacceptable, as general provisions do not derogate from special ones. In simple terms, where a special provision (in this case s. 9) is made in a special statute (the SSA 93), that special provision excludes the operation of a general provision in the general law (in this case s. 40(2) of the IA 48). (*PP v. Chew Siew Luan* [1982] 2 MLJ 119; *PP v. Chu Beow Hin* [1882] 1 MLJ 135; *Perwaja Steel Sdn Bhd & Anor v. Majlis Daerah Kemaman, Terengganu* [1994] 3 MLJ 15).

The fact that, among others, the sum demanded was awesomely large, meant for a future project which was not the responsibility of the plaintiff, or for the benefit of the plaintiff's project, a practice which had also been stopped of late as admitted by the defendant, perhaps hold testimony of its impropriety, did not go down well for the defendants' case either. In this current case as the comprehensive sewerage and treatment plant system sent for approval was in order, as opposed to a contributive demand that was not, the defendant's predicament was certainly untenable.

However excellent the motive of the second defendant was in imposing that capital contribution, it was unconstitutional and contrary to law (*Howe Yoon Chong v. Chief Assessor, Property Tax, Singapore* [1978] 2 MLJ 87). By analogy, to echo the view of Lord Justice Atkin in *Attorney General v. Wilts United Diaries Ltd,* Times LR Vol xxxvii (886):

> If an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown he must show, in clear terms, that Parliament has authorized the particular charge the circumstances would be remarkable indeed which would induce the court to believe that the legislature has sacrificed all the well known checks and precautions, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department.

It would not be complete if I do not touch on the case of *Bencon Development Sdn Bhd v. Jabatan Perkhidmatan Pembentungan dan 2 Lagi (unreported)* (Usul Pemula 25-122-1997), as both parties had adverted to it. There is some obvious similarity in that case with the current one, not only as regards the provisions, but also in relation to the facts where the developer was required to contribute RM2.5 million to the Department of Sewerage. The court there, when identifying the contested issue had stated:

> There is only one ground in this application: whether the first respondent has power to require the applicant to make contribution for the upgrading of the existing sewerage system when it approved the applicant's application to connect its sewerage system to the public sewerage system.

Having perused the above-unreported case, I could not help noting certain differences, which influenced my subsequent stance. In the current case the plaintiffs controversial sewerage treatment plant was built on its own land and paid by it, whilst in that unreported case, the applicant to save cost, had wanted to be connected to a treatment system, which was owned and paid by a third party. Call it compensation, or cost sharing, if the applicant there had refused to accede to the request of contribution, it would have been devoid of any choice but to build its own system, which could be more expensive and superfluous in the long run. Nothing is for free. In fact the court there had recognized this predicament and had correctly assessed thus:

> In this case, besides what I have stated, the applicant has a choice. If it does not want to make the contribution it can always construct its own treatment plant. That was what it originally planned, applied for approval and was approved.

On the above distinguishing factors, I was unable to agree to the submission of the defendant that the outcome of this case should not be dissimilar to the above-unreported case. In fact the very poignant words of "... the applicant has a choice. If it does not want to make the contribution it can always construct its own plant" seemed to prejudice the case of the defendant Here, the plaintiff had indeed wanted to construct its very own plant. If that condition had been adhered to, then surely the plaintiff need not have to make that contribution! Such a demand now would smell of extortion on the part of a Government's agency, to say the least.

Based on all the above reasons I had no hesitation in allowing the application with costs.